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No. 451

In the Supreme Court of the United States

OCTOBER TERM, 1957

SOLOMON P. ROSENBLOOM, ALSO KNOWN AS SOL ROSENBLOOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOSEPH F. GOETTEN,
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OPINION BELOW

The Court of Appeals wrote no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1957. (Pet. 9–10, R. 8.) A "Motion to Set Aside Judgment Dismissing Appeal" filed by petitioner on July 29, 1957 (R. 9–11), was denied on August 19, 1957 (Pet. 10; R. 28). The petition for a writ of certiorari was filed on September 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the court below erred in dismissing petitioner's appeal as untimely.

RULE INVOLVED

Federal Rules of Criminal Procedure:

> RULE 37. TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI.
>
> (a) *Taking Appeal.*
>
> * * * * * *
>
> (2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. * * *
>
> * * * * * *

STATEMENT

On November 14, 1956, an indictment in six counts was filed in the United States District Court for the Eastern District of Missouri, charging petitioner with violations of the internal revenue laws (Sections 145 (b) and 3793 (b) (1) of the Internal Revenue Code of 1939). (R. 4.) After a jury trial,[1] at which he

[1] The abbreviated record filed by petitioner does not contain the trial testimony.

was represented by three attorneys (Messrs. Shaw, Smith and Steinger), petitioner was found guilty on all counts. (R. 5.) On June 5, 1957, petitioner filed a motion for new trial and judgment of acquittal notwithstanding verdict. (R. 5.) On June 14, 1957, this motion was submitted without argument (Appendix, *infra*, p. 8) and overruled in the presence of petitioner and one of his attorneys, Mr. Shaw (R. 5; Pet. 2). Later, on the same day (Appendix, *infra*, p. 9) petitioner appeared with his counsel (Mr. Shaw) and was sentenced to concurrent prison sentences of 18 months on each count, and fined $1,250 on counts 1 and 2, a total fine of $2,500 (R. 26–27). At that time the following colloquy took place (R. 25, 27):

> The COURT. * * *
>
> * * * * * *
>
> Do you want some time for your client before he turns in?
>
> Mr. SHAW. Your Honor, I was going to ask for some time in which to get his affairs straightened out, and within which to file an appeal, should we so desire to do.
>
> The COURT. Very well. If you file an appeal, of course, if you apply for bond, I will tell you now that I will grant you bond. Be permitted to go under the bond you are under now. How much time do you want?
>
> Mr. SHAW. About two weeks, your Honor.
>
> The COURT. How about Monday, July 1st, or do you want it the 8th, the following Monday?
>
> Mr. SHAW. That will be all right.
>
> The COURT. Be given until July 8th.
>
> Mr. SHAW. Thank you.

On June 14, 1957, docket entries were made showing issuance of the judgment of conviction, imposition of sentence, and the granting of a stay of execution until July 8, 1957. (R. 6.) On July 8, 1957, petitioner filed a notice of appeal from the judgment of conviction. (R. 3.) Three days later the Government moved to dismiss the appeal as untimely, and the appeal was dismissed on July 24, 1957. (R. 1, 8, 11.) On July 29, 1957, defense counsel Shaw filed a motion to set aside the judgment dismissing the appeal, alleging that he was not aware that the rules of the Court of Appeals required him to file any pleading in opposition to the motion to dismiss; and that he had thought that he would receive some notice of the setting of that motion for argument. (R. 9–10.) In connection with this motion, defense counsel Shaw filed an affidavit that prior to July 8, 1957, he had not received written notice that the motion for a new trial had been overruled; and that, although he had heard the trial judge's statements on June 14, 1957, with respect to denial of the motion for a new trial and imposition of sentence, he had not understood that either the overruling of that motion or the sentence and judgment would be in effect until July 8, 1957. (R. 20.) This motion was denied on August 19, 1957. (Pet. 10; R. 28.)

ARGUMENT

Petitioner contends (Pet. 3, 5–6) that his appeal should not have been dismissed as untimely, because (*a*) his attorney misunderstood the actions of the trial judge (*supra*, p. 3), believing them to mean that "neither the actual overruling of the motion nor the

sentence and judgment would be in effect until July 8, 1957", and (*b*) neither petitioner nor his attorney had received a written notice from the Clerk of the District Court, in accordance with Rule 49 (c) of the Federal Rules of Criminal Procedure, that the orders were entered on June 14, 1957.[2] The contention is without merit.

The timely filing of a notice of appeal is mandatory and jurisdictional, and the filing of a notice out of time does not confer jurisdiction upon the appellate court. *Lujan* v. *United States*, 204 F. 2d 171 (C. A. 10th); *Wagner* v. *United States*, 220 F. 2d 513 (C. A. 4th); *United States* v. *Bloom*, 164 F. 2d 556 (C. A. 2d), certiorari denied, 333 U. S. 857. In the case at bar the ten-day period provided by Rule 37 (a) (2) of the Federal Rules of Criminal Procedure, *supra*, p. 2, expired on June 24, 1957, and petitioner's notice of appeal was 14 days late. True, it has been held that the time for appeal does not run against an order until the notice prescribed by Rule 49 (c) has been given (*Carter* v. *United States*, 168

[2] Petitioner also alleges that the instant case is in conflict with *Gonzalez* v. *United States*, 352 U. S. 978, and *Lohman* v. *United States*, 237 F. 2d 645 (C. A. 6th). *Gonzales* involved the question whether the appeal was in fact one from a judgment entered in a proceeding under 28 U. S. C., Section 2255, the lower court having dismissed the appeal on the ground that it was governed by the Federal Rules of Criminal Procedure. *Gonzalez* v. *United States*, 233 F. 2d 825 (C. A. 1st). This Court remanded the cause "for consideration on the merits as a timely appeal under the Federal Rules of Civil Procedure". (352 U. S. 978.) In *Lohman*, it did not appear, as it does in the case at bar, that the appellant had actual notice of the judgment by reason of his presence in court at the time. (237 F. 2d 645, 646.)

F. 2d 310 (C. A. 10th)), but that rule has no application where a defendant has actual notice by reason of his presence in court. In that event he is not entitled to rely upon a written notice from the clerk, and failure to give such notice does not suspend the running of time. *Huff* v. *United States*, 192 F. 2d 911 (C. A. 5th), certiorari denied, 342 U. S. 946; *Gonzalez* v. *United States*, 233 F. 2d 825, 827 (C. A. 1st), reversed on other grounds, 352 U. S. 978. See *Lohman* v. *United States*, 237 F. 2d 645, 646 (C. A. 6th). In the instant case it is conceded that "petitioner and his then attorney were in the court room on June 14, 1957, when the District Judge denied petitioner's written motion for new trial and imposed sentence". (Pet. 2.)[3]

We suggest that the contention now made that petitioner's attorney misunderstood the trial court's comments is no more than an after-thought. It was not until after the appeal had been dismissed that defense counsel Shaw filed his affidavit stating that it was his "understanding that neither the actual overruling of the Motion nor the sentence and judgment would be in effect until July 8, 1957, at which time the Defendant Sol Rosenbloom would appear for formal sentence and judgment". (R. 20.) We submit that the colloquy between the court and defense

[3] Petitioner relies (Pet. 5-6) upon *Lohman* v. *United States*, *supra*, for the proposition that it is only where "actual knowledge is established that the notice required by Rule 49 (c) may be deemed to have been waived". The *Lohman* case, however, merely distinguishes actual notice from implied or constructive notice, and there is no requirement that actual knowledge as well as actual notice be established.

counsel (*supra*, p. 3) is not reasonably susceptible of any such interpretation; that the court was merely giving petitioner a few weeks to straighten out his affairs before beginning to serve the sentence; and that it was then apparent that petitioner had not yet decided whether to appeal. A stay of execution was all that had been sought by petitioner's counsel and all that was granted by the trial judge. (R. 6.)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

OCTOBER 1957.

APPENDIX

In the United States District Court for the Eastern District of Missouri, Eastern Division

No. 28764 (2)

UNITED STATES OF AMERICA, PLAINTIFF

v.

SOLOMON P. ROSENBLOOM, A/K/A SOL ROSENBLOOM, DEFENDANT

AFFIDAVIT OF ASSISTANT UNITED STATES ATTORNEY, WAYNE H. BIGLER, JR.

Before me, the undersigned Clerk of the United States District Court for the Eastern District of Missouri, St. Louis, Missouri, personally appeared Wayne H. Bigler, Jr. and upon his oath states that he is Assistant United States Attorney for the Eastern District of Missouri and was such on Friday, June 14, 1957, representing the United States of America in the above entitled cause and that on that date, which was the second Friday in June, District Judge Roy W. Harper called his regular motion docket which in Division No. 2 is always called on the second Friday of each month; and that the Motion for a New Trial of Solomon P. Rosenbloom, which had been filed on June 6, 1957 in the above entitled cause, was called for argument on said docket and that Attorney Charles M. Shaw stated there would be no argument on the motion, whereupon Judge Harper announced that the motion was overruled.

Thereafter, after calling other motions in other cases, the above entitled cause was again called by the Judge and the proceedings as indicated in the transcript of the official Court reporter took place.

WAYNE H. BIGLER, Jr.,
Assistant United States Attorney.

Subscribed and sworn to before me this 12th day of September, 1957.

[SEAL] GEO. J. BRENNAN,
Clerk, United States District Court,
Eastern District of Missouri.

U. S. GOVERNMENT PRINTING OFFICE: 1957